

No. 17-7492

IN THE
SUPREME COURT OF THE UNITED STATES

BRANDON DANIEL,
Petitioner,
v.
THE STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the
Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Given that Daniel's due process claim was not raised in his post-conviction application for writ of habeas corpus to the court below, the Texas Court of Criminal Appeals, and, therefore, was not addressed by that court, does this Court have jurisdiction to consider that claim? If so, then:

1. Was petitioner denied due process in a state collateral proceeding where the convicting court provided him with written notice of the issues to be resolved and opportunities to present evidence in support of his claims, and in contravention of the State's evidence, before resolving the designated, controverted factual issues?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

I. Facts Of This Capital Murder Committed At An Austin Walmart

In the early hours of April 6, 2012, petitioner entered a Walmart store with the intention of shoplifting (RR 24: 167).¹ Petitioner brought along a firearm, a Jimenez Arms .380, loaded with hollow point bullets “just in case.” (RR 19: 165). Petitioner appeared intoxicated so the store manager called police because he feared petitioner would be a danger to himself and others. (RR 18: 54).

Austin Police Officer Jaime Padron responded to the call, and he and the store manager encountered petitioner in the store. (RR 18: 58-59, 177, 179). Officer Padron, dressed in full police uniform, announced that he was with the Austin Police Department and told petitioner to stop. (RR 18: 38, 56, 59-60, 132). Petitioner lowered his shoulder, ducked away from Officer Padron, and ran for the exit. (RR 18: 59). Officer Padron gave chase and tackled petitioner from behind. (RR 18: 60). Petitioner pulled a gun from his waistband as Officer Padron attempted to subdue him. (RR 18: 95-96). When Officer Padron tackled petitioner, the manager heard a gunshot, and he heard an additional gunshot when petitioner and Officer Padron fell to the ground. (RR 18: 60-61, 63). Another Walmart

¹ References to the Reporter’s Record of the trial are made herein in the form of “(RR X: Y)” where the variable X indicates the volume number and the variable Y indicates the page number of that volume.

employee saw petitioner put the gun to Officer Padron's neck and shoot him. (RR 18: 119-120).

The manager immediately jumped on petitioner who raised his arm and fired a third shot, which just missed striking the manager and another employee in their heads. (RR 18: 61, 133-134). Once subdued by Walmart employees, petitioner raised his head from the floor, looked at Officer Padron, "kind of laughed, chuckled and said, 'I killed a cop.'" (RR 18: 64, 151). Officer Padron never pulled a weapon of any kind when chasing petitioner. (RR 18: 64, 98). He died at the scene. (RR 18: 205).

Police seized petitioner's firearm, which had two additional live rounds in the chamber and attached magazine. (RR 19: 65-66; SX27). Police also searched the petitioner's backpack and found various grocery items in it. (RR 18: 235; RR 22: 57). Petitioner had killed Officer Padron over \$56.90 worth of shoplifted items. (RR 22: 62; SX78).

II. Course Of Proceedings And Dispositions Below

A. Jury Trial

The State indicted petitioner for the capital murder of Austin Police Officer Jaime Padron under Texas Penal Code §19.03(a)(1). (CR 98, 100).² Trial was had in the 403rd Judicial District Court of Travis County, the Honorable Brenda

² References to the Travis County District Clerk's record are made herein in the form of "CR Y" where Y represents the page number in the clerk's record.

Kennedy presiding. The jury found petitioner guilty of capital murder of Officer Padron as alleged in the indictment. (CR 184). The trial court sentenced petitioner to death based on the jury's answers to the punishment issues. (CR 189; RR 26: 221).

B. Direct Appeal

On direct appeal, petitioner raised three points of error challenging the legal sufficiency of the evidence to sustain the jury's affirmative answer to the future dangerousness issue at punishment, the trial court's refusal of his challenge for cause to a prospective juror, and the trial court's limitation on his voir dire of an expert witness. In a unanimous opinion, the Texas Court of Criminal Appeals overruled petitioner's points of error and affirmed the judgment of the trial court. *Daniel v. State*, 485 S.W.3d 24 (Tex. Crim. App. 2016).

C. Post-Conviction Proceedings

On February 12, 2016, while the cause was pending on direct appeal to the Texas Court of Criminal Appeals, petitioner filed an application for writ of habeas corpus in the convicting court pursuant to Article 11.071, Sec. 4 of the Texas Code of Criminal Procedure. (WR CR I: 1 – WR CR IV: 776).³ In his writ application, petitioner raised eleven grounds for relief, to-wit: ineffective assistance of trial counsel; violation of due process in the trial court's response to an alleged jury note;

³ References to the clerk's record on the application for writ of habeas corpus are made in the form of "(WR CR X: Y)" wherein X designates the volume number of the clerk's record on the writ application and Y represents the page number of that volume.

violation of due process in the State's alleged knowing use of false evidence; a state constitutional violation; violation of various constitutional rights by an improperly funded defense; a *Brady*⁴ violation; an unconstitutional state statute on voluntary intoxication; and various challenges to the constitutionality of the Texas death penalty statute. His first ground for relief alleging ineffective assistance of counsel presented eleven separate claims, with multiple arguments thereunder, and a twelfth claim of cumulative prejudice. Petitioner filed two volumes of exhibits with thirty exhibits, totalling hundreds of pages of documentary evidence, in support of his application for writ of habeas corpus. (WR CR I: 2 – WR CR II: 430).⁵

On February 16, 2016, petitioner filed a motion to recuse the judge of the convicting court, Judge Kennedy, from presiding over his Article 11.071 writ application. (WR CR IV: 777-836). In accordance with the law, Judge Kennedy declined to recuse herself and requested the Presiding Judge of the Third Administrative Judicial Region to assign a judge to hear the recusal motion. *See* Tex. R. Civ. Proc. 18a.⁶ (WR CR IV: 864). Pursuant to Rule 18a(d) of the Texas Rules of Civil Procedure, the Presiding Judge of the Third Administrative Judicial Region appointed the Honorable Doug Shaver to hear the motion to recuse and to make such orders as justice required. (WR CR IV: 863). Petitioner also filed a

⁴ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁵ Volume two of petitioner's writ exhibits contained exhibits 23-30, which were filed under seal. (WR CR II: 430).

⁶ "When a recusal motion is timely filed, Rule 18a leaves a trial judge with no discretion – the trial judge must either recuse himself or refer the motion for another judge to decide." *See De Leon v. Aguilar*, 127 S.W.3d 1, 5 (Tex. Crim. App. 2004).

supplement to his motion to recuse (WR CR IV: 873-885) and a motion for discovery (WR CR IV: 865-871), which was granted by Judge Shaver before the State received actual notice of the motion. The State filed a response opposing petitioner's recusal motion and supplement and disputing petitioner's factual allegations. (WR CXR IV: 906-929).

Judge Shaver held a hearing on the petitioner's recusal motion and supplemental motion. (WR CR V: 1196-1222). The State provided discovery to petitioner prior to the hearing, in accordance with the discovery order. Petitioner presented evidence⁷ on his recusal motions (WR CR V: 1223-1237), and both sides presented argument. After considering the evidence and argument at the hearing, Judge Shaver denied the motion to recuse Judge Kennedy on April 14, 2016. (WR CR IV: 930).⁸

On May 5, 2016, petitioner filed a motion for leave to file a petition for writ of mandamus and a petition for writ of mandamus in the Texas Court of Criminal Appeals. *In re Brandon Daniel*, WR-83,459-02. Petitioner sought to compel the recusal of Judge Kennedy from presiding over his Article 11.071 writ proceeding in the convicting court. Petitioner filed over 500 pages of documentary evidence, including 90 pages of sealed exhibits, with his petition for writ of mandamus.

⁷ Petitioner presented no competent evidence of an alleged jury note to support his recusal motion. His contention in his Petition for Writ of Certiorari that Judge Kennedy "secretly communicated" with the jury is not supported by the record. *See* Pet. Writ Cert. 4.

⁸ Approximately six months after the hearing on the recusal motion, petitioner moved to improperly supplement the record from that hearing with evidence that was not admitted during the hearing, i.e. new evidence. Under the Texas Rules of Appellate Procedure, the record may be supplemented if something has been omitted, but the supplementation rules cannot be used to create new evidence. *Amador v. State*, 221 S.W.3d 666, 676-77 (Tex. Crim. App. 2007).

The State filed a response to petitioner's motion for leave to file and to the petition for writ of mandamus arguing against petitioner's requested relief. The State noted, in part, that Rule 18a(j) provided an adequate remedy at law for petitioner's review of the denial of his motion to recuse Judge Kennedy via review on his Article 11.071 writ application. The Texas Court of Criminal Appeals denied petitioner motion for leave to file the original writ of mandamus without written order on July 27, 2016. *In re Brandon Daniel*, WR-83,459-02. Petitioner did not thereafter supplement his application for writ of habeas corpus to appeal the denial of his motion to recuse Judge Kennedy per Rule 18a.

On August 10, 2016, the State timely filed its Original Answer in response to petitioner's application for writ of habeas corpus pursuant to Article 11.071, Sec. 7 of the Texas Code of Criminal Procedure. (WR CR IV: 948 – WR CR V: 1061). The State attached six exhibits to its Original Answer in support of its arguments and in contravention to factual allegations in petitioner's writ application. (WR CR V: 1062-1082). Petitioner thereafter on August 26, 2016, filed a motion requesting the convicting court to designate issues of fact to be resolved and to hold an evidentiary hearing. *See* Tex. Code Crim. Proc. Art. 11.071, Sec. 9(a). (WR CR V: 1083-1103). The State responded to this motion, also requesting the convicting court to designate issues to be resolved and the manner in which those issues would be resolved under Article 11.071, Sec. 9(a). (WR CR V: 1104-1113).

After considering petitioner's application for writ of habeas corpus and the State's answer thereto, the judge of the convicting court entered an order

designating the issues to be resolved, per Article 11.071, Sec. 9(a), on September 7, 2016. (WR CR V: 1114-1115). The issues to be resolved were whether petitioner's trial counsel rendered ineffective assistance of counsel as alleged in Grounds 1(a)-(k) of his habeas application. (WR CR V: 1114). The convicting court judge ordered petitioner's trial counsel to submit affidavits addressing the designated issues. *Id.* The convicting court judge also ordered the parties to file proposed findings of fact and conclusions of law within 30 days of her order. *Id.* at 1115.

On October 7, 2016, petitioner gave notice of his inability to comply with this 30-day deadline. (WR CR V: 1122-1136). Judge Kennedy entered an order extending the time in which the parties were to file proposed findings and conclusions by one week. (WR CR VII: 1544). The judge also gave notice to the parties that she would resolve the designated issues based on the affidavits of trial counsel, petitioner's writ application and attached exhibits, the State's answer and attached exhibits, and the court's personal recollection. *Id.* The State timely filed its proposed findings and conclusions; but, petitioner requested further time to file his proposed findings and conclusions. (WR CR VII: 1511-1537; 1545-1574). The judge entered an order granting an additional 30 days' time to file the proposed findings and conclusions, making them due November 10, 2016. (WR CR VII: 1584).

After receiving two extensions, petitioner filed his proposed findings of fact and conclusions of law on November 10, 2016. (WR CR VII: 1618 – WR CR VIII: 1797). He also filed a document requesting an opportunity to challenge adverse evidence in a live evidentiary hearing or deposition. (WR CR VII: 1595-1617). On

November 30, 2016, the judge of the convicting court filed her extensive fact findings and conclusions of law and recommended that petitioner be denied relief on his writ application. (WR CR VIII: 1806-1835). The judge also denied petitioner's motion for the hearing he requested to challenge adverse evidence. (WR CR VIII: 1805). The Travis County District Clerk forwarded the record on the habeas corpus application to the Texas Court of Criminal Appeals, which received it on December 9, 2016.

On January 19, 2017, petitioner transmitted to the Texas Court of Criminal Appeals his objections to the convicting court's findings and conclusions and a request for remand to redo the proceedings on the writ application in the convicting court based on a recusal of Judge Kennedy. This filing was not presented as a supplement to his writ application, however.

The Texas Court of Criminal Appeals denied relief to petitioner on his Article 11.071 application for writ of habeas corpus in a written order. *Ex parte Brandon Daniel*, (Tex. Crim. App. WR-83,459-01 delivered October 18, 2017). Specifically, the Court of Criminal Appeals held that petitioner's claim 2 regarding the alleged jury note was not cognizable on habeas review, that claims 3, 4, 5, and 7 were procedurally barred, and that due process claims based on the Texas Constitution were not cognizable on habeas review. *Id.* at 2-3. The Court determined petitioner's claim 6, the *Brady* issue, was not supported with adequate facts and that evidence before the Court contradicted petitioner's claim. *Id.* at 6. The Court summarily rejected petitioner's constitutionality challenges to the death penalty

statute in claims 8-11, as those issues had been repeatedly rejected by the Court and petitioner raised nothing new to persuade the Court to reconsider its prior holdings. *Id.* 5-6. Finally, the Court addressed and rejected petitioner's ineffective assistance of counsel grounds in claim 1, specifically addressing in its written order the merits regarding petitioner's claim of counsel's alleged failure to investigate and present a diagnosis of Autism Spectrum Disorder. *Id.* at 3-5. Based on the convicting court's findings and conclusions and its own review of the record, the Texas Court of Criminal Appeals denied petitioner relief on his writ application. *Id.* at 6.

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction To Address The Due Process Question That Was Not Presented To or Addressed By The Court Below.

The question petitioner seeks this Court to answer is what process is due in state post-conviction proceedings in a capital case. Petitioner contends that the convicting court's adjudication of his constitutional claims in his application for writ of habeas corpus deviated from the state statutory process and did not satisfy the minimum procedural requisites of the Fourteenth Amendment's due process clause. *Pet. Writ Cert.* 26-27. After the convicting court resolved the controverted issues in this case and ordered transmission of the writ record to the Texas Court of Criminal Appeals, petitioner did not amend or supplement his writ application to raise this due process issue. And, petitioner did not challenge the denial of his motion to

recuse the judge of the convicting court on his application for writ of habeas, the appropriate means. *See Ex parte Sinegar*, 324 S.W.3d 578 (Tex. Crim. App. 2010). Consequently, petitioner's due process concerns were not presented to or addressed by the Texas Court of Criminal Appeals. The question of what process is due in state post-conviction proceedings in a capital case is not properly before this Court. Review should be denied. 28 USCS §1257(a); *Yee v. City of Escondido*, 503 U.S. 519, 532-33 (1992).

Petitioner's additional issue, viz: whether the convicting court deviated from statutory process provided in Article 11.071 of the Texas Code of Criminal Procedure, is a state law question of statutory interpretation and applicability. Petitioner complains of the convicting court's manner of resolution, and ultimate determination, of controverted issues under Article 11.071, a statute that vests the convicting court with broad discretion in resolving controverted fact issues in habeas corpus proceedings. This issue also was not raised in petitioner's application for writ of habeas corpus and, therefore, whether the convicting court deviated from state statutory procedure on the writ application was not addressed by the Texas Court of Criminal Appeals. Petitioner does not challenge the constitutional validity of Article 11.071, and he, in fact, acknowledges that the state statutory scheme may operate in a constitutionally adequate manner. Pet. Writ Cert. 26. Under these circumstances, review by this Court is not appropriate. 28 USCS §1257(a); *Yee v. City of Escondido*, 503 U.S. at 532-33.

“The Great Writ protects a ‘proper respect for the concept of justice’ and therefore courts require ‘that petitions be filed in earnest and that all contentions of merit be presented and ruled upon as expeditiously as possible.’” *Ex parte Medina*, 361 S.W.3d 633, 642 (Tex. Crim. App. 2011). Because petitioner failed to raise all alleged contentions of merit in his writ application to be reviewed by the Texas Court of Criminal Appeals, there is no compelling reason to grant review in this cause.

II. No Compelling Reason Exists To Grant This Petition For Writ Of Certiorari Where The Convicting Court Provided Petitioner With Due Process In Regard To Resolving The Controverted Issues Presented In The Writ Application.

The legislative framework of Article 11.071 of the Texas Code of Criminal Procedure contemplates that the habeas judge is “Johnny-on-the-spot.” *Ex parte Simpson*, 136 S.W.3d 660, 668 (Tex. Crim. App. 2004). The judge of the convicting court is the collector of the evidence, the organizer of the materials, the decision maker as to what live testimony may be necessary, the factfinder who resolves disputed factual issues, the judge who applies the law to the facts and enters specific findings of fact and conclusions of law, and may make a specific recommendation to grant or deny relief. *Ex parte Simpson*, 136 S.W.3d at 668.

Section 8(a) of Article 11.071 of the Texas Code of Criminal Procedure states in part that after the state answers the application, “the convicting court shall determine whether controverted, previously unresolved factual issues material to the legality of the applicant’s confinement exist and shall issue a written order of

the determination.” If the convicting court determines such factual issues exist, Section 9(a) requires that the court issue an order designating the issues of fact to be resolved and the manner in which the issues will be resolved.

In the proceedings below, the judge of the convicting court followed these statutory requisites and provided petitioner due process notice and an opportunity to be heard on his application for writ of habeas corpus.

A. The Judge Of The Convicting Court Gave Notice Of The Issues To Be Resolved On The Writ Application And The Manner In Which Those Issues Would Be Resolved.

Both petitioner and the State requested the judge of the convicting court to designate the issues to be resolved on his writ application per Article 11.071, Sec. 9(a). (WR CR V: 1083, 1104, respectively). That section of Article 11.071 provides:

Sec. 9. Hearing.

(a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

In response to petitioner's and the State's requests, Judge Kennedy, the judge of the convicting court, timely filed an order designating the issues to be resolved, thus providing notice to the parties of the relevant issues. (WR CR V: 1114-1115). Those designated issues were whether petitioner's trial counsel rendered ineffective assistance as specifically alleged in Grounds 1(a)-(k) of petitioner's writ application.

Id. at 1114. Petitioner had full notice of the factual issues to be resolved under these specific grounds based on the judge’s designation of these issues, his pleadings in his writ application, and the State’s answer disputing and disproving his factual allegations. *See Ex parte Medina*, 361 S.W.3d at 642 (the fact issues that must be resolved are those contained within the writ application and the State’s controverting answer). Judge Kennedy ordered petitioner’s trial counsel to submit affidavits addressing the issues raised in Grounds 1(a)-(k).⁹ (WR CR V: 1114-1115).

After designating the issues to be resolved, Judge Kennedy entered an order specifying the manner in which the designated issues would be resolved in accordance with Article 11.071, §9(a). (WR CR VII: 1544). That statute provides that the convicting court determines how controverted, unresolved factual issues shall be resolved. As noted *supra* at 17, Article 11.071, §9(a) allows that the court **may** require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection in resolving issues. The Texas legislature has invested trial courts with broad discretion with regard to the means by which controverted fact issues may be resolved in habeas corpus proceedings. *See e.g. Ex parte Gonzalez*, 323 S.W.3d 557, 561 (Tex. App. – Waco 2010, pet.ref’d.) (construing language in Art. 11.072, in same manner as language in Art. 11.07, due to similarity of text). *See and compare* Art. 11.071, §9. Petitioner’s contention that

⁹ Both defense counsel submitted affidavits addressing the designated issues without need for clarification or additional specification of the issues. (WR CR V: 1116; WR CR VII: 1538).

Article 11.071 provides “mandatory procedures” for factual resolution of issues is incorrect under state law. Pet. Writ Cert. ii.

Judge Kennedy specifically informed the parties that she would resolve the designated issues based on the affidavits of trial counsel, petitioner’s writ application and attached exhibits, the State’s answer and attached exhibits, and the court’s personal recollection, in accord with her discretion allowed via Article 11.071, §9(a). (WR CR VII: 1544).¹⁰ A live evidentiary hearing was not required to resolve the issues. *See e.g. Ex parte Davila*, 530 S.W.2d 543, 545 (Tex. Crim. App. 1975) (construing language in Art. 11.07 that provides the court *may* hold a hearing on a habeas petition). It is especially true that a live evidentiary hearing is not required to resolve designated issues where the trial judge before whom the writ application is pending also presided over the applicant’s trial, as was true in this case. *See Ex parte Gonzalez*, 323 S.W.3d at 561, citing *Ex parte Davila*, 530 S.W.2d at 545.

Judge Kennedy followed the statutory procedure under Article 11.071 in providing petitioner and the State with notice of the designated issues to be resolved and the manner in which the court would resolve those issues. There was no abuse of discretion or denial of due process by the judge of the convicting court.

¹⁰ This order was the only one issued by the judge of the convicting court addressing the evidentiary materials under Article 11.071, Sec. 9(a) that would be utilized in resolving the designated issues. Petitioner’s assertion that “the habeas court changed the manner of fact-finding” with this order is not supported by the record. *See* Pet. Writ Cert. 17.

B. The Judge Of The Convicting Court Considered Substantial Evidence From Both Petitioner And The State In Resolving The Controverted Issues Presented In The Writ Application.

The Texas Court of Criminal Appeals has reflected a historical willingness to consider the merits of timely filed supplemental or amended pleadings on an application for writ of habeas corpus. *Ex parte Saenz*, 491 S.W.3d 819, 825 (Tex. Crim. App. 2016); *see e.g. Ex parte Robbins*, 360 S.W.2d 446 (Tex. Crim. App. 2011) (supplemental claim filed one month after filing of initial application); and *Ex parte Jimenez*, 364 S.W.3d 866 (Tex. Crim. App. 2012) (supplemental claim filed one year after filing of initial application). That Court considers the merits of such pleadings, if the issues are cognizable and ripe for review, when the applicant files them before the Texas Court of Criminal Appeals has disposed of the pending application. *Ex parte Saenz*, 491 S.W.3d. at 824.

An applicant may supplement his pleadings in his application for writ of habeas corpus by attaching affidavits and documentary evidence. *Ex parte Whisenant*, 443 S.W.3d 930, 932 (Tex. Crim. App. 2014). These evidentiary materials are meant both to augment the specificity of the applicant's factual allegations and, to a certain extent, to contribute to applicant's satisfaction of his ultimate burden to prove entitlement to relief by a preponderance of evidence. *Ex parte Whisenant*, 443 S.W.3d at 932. Whether this proof accompanies the pleading or awaits development after the convicting court judge designates the issues, the factual development that follows an adequately pled writ application should be substantially completed before the convicting court enters its recommended findings

of fact to be transmitted to the Texas Court of Criminal Appeals. *Id.* Attachments to the parties' pleadings in writ proceedings are part of the habeas corpus record. *Ex parte Campbell*, 226 S.W.3d 418, 423 (Tex. Crim. App. 2007).

Petitioner initially attached two volumes of evidentiary materials to his application for writ of habeas corpus filed in the convicting court. (WR CR I-IV: 1-751). The volumes contained 30 exhibits, encompassing more than 500 pages of evidentiary material, as evidence in support of his writ claims. This evidentiary material consisted of affidavits, personal and family records for petitioner, other trial proceedings of his family, prison records from a punishment witness, and an email from a mitigation specialist. (WR CR I: 2 – WR CR II: 430). Both exhibit volumes contained evidence addressing the issues of ineffective assistance counsel as raised in ground one and the alleged jury note raised in ground two, among other issues raised in the writ application regarding false testimony. Petitioner's assertion that the convicting court "accepted evidence from the State but not [him]" misrepresents the writ record and ignores the substantial evidentiary material he presented to the convicting court in these two volumes of exhibits. *See* Pet. Writ Cert. 22.

The State also filed evidentiary material with its Answer to petitioner's writ application. (WR CR V: 1061-1082). The State's evidence, in contravention to petitioner's claims of ineffective assistance of counsel, the alleged jury note, and the *Brady* issue, consisted of affidavits from defense counsel, court personnel, a prosecutor, a community supervision officer, and a juror. Thereafter, the convicting

court judge designated issues to be resolved, and on October 11, 2016, gave notice that the issues would be resolved through affidavits of trial counsel, petitioner's writ application and attached exhibits, the State's answer and its attached exhibits, and the court's personal recollection. *See e.g. Ex parte Simpson*, 136 S.W.3d at 662 (trial judge entered an order that found that there were no factual issues that could not be resolved by using the trial record and the written writ materials).

Pursuant to the order of the convicting court, petitioner's defense counsel filed their affidavits on September 20th and October 11th of 2016. Their affidavits refuted petitioner's factual allegations in his ineffective assistance of counsel claims. (CR V: 1116; CR VII: 1538). Petitioner did not file any additional or controverting evidence to his counsel's affidavits or to the State's evidence in the convicting court. Instead, he motioned for a live evidentiary hearing or deposition, neither of which he was entitled to under Article 11.071. (CR VII: 1594, 1602 – Petitioner's Motion), (CR VIII: 1798 – State's Reply Opposing Petitioner's Motion). Petitioner failed to avail himself of the mechanism established by the Texas Court of Criminal Appeals to present additional evidence to the convicting court. *See Ex parte Pena*, 484 S.W.3d 428, 430 (Tex. Crim. App. 2016); *Ex parte Whisenant*, 443 S.W.3d at 932.

Six weeks after designating the issues, the judge of the convicting court entered her findings of fact and conclusions of law based on the evidentiary materials filed in the convicting court. (CR VIII: 1806). The record does not support petitioner's assertion that the convicting court acted "solely" on evidentiary proffers procured by the State and on its own personal recollections. Pet. Writ Cert.

27. Additionally, the record does not support petitioner's contention that the judge of the convicting court denied him the opportunity to present additional evidence on his writ application. There was no ruling by Judge Kennedy denying petitioner the opportunity to present additional evidence post-filing of his writ application; petitioner was only denied a hearing to challenge the evidence in the convicting court in the manner in which he wanted, to-wit: by deposition or live hearing. Pet. Writ Cert. 18, 22. Article 11.071 does not allow for the applicant to determine how controverted issues are resolved; it is within the convicting court's discretion.

Even after the writ application had been transmitted to the Texas Court of Criminal Appeals, petitioner could have filed supplemental evidence in the convicting court for consideration. *Ex parte Whisenant*, 443 S.W.3d at 933. If a writ application has been received by the Texas Court of Criminal Appeals and is pending before that court but has not yet been filed and set for submission, a party who wishes that court to consider additional evidence "must" file a motion in the Texas Court of Criminal Appeals to stay the proceedings pending the filing of the evidence in the convicting court. *Ex parte Pena*, 484 S.W.3d 428, 430 (Tex. Crim. App. 2016). In that motion, the party should describe the evidence he intends to file in the convicting court and explain its evidentiary value. *Ex parte Pena*, 484 S.W.3d at 430.

Petitioner did not follow these procedures enunciated in *Ex parte Pena* to file additional evidence in support of his writ claims or adverse to the State's evidentiary materials during the ten months that his writ application was pending

before the Texas Court of Criminal Appeals. And, petitioner fails to identify any relevant, controverting evidence that he wished to present before the convicting court resolved the designated issues. Petitioner's claim that he was denied the opportunity to introduce evidence in support of the claims in his writ application is not supported by the record in this cause. Pet. Writ Cert. 30.

CONCLUSION

Petitioner had a full and fair opportunity to present his constitutional claims in accordance with the procedures of Article 11.071. *Cf. Ex parte Medina*, 361 S.W.3d at 642. The judge of the convicting court acted within her statutorily-authorized discretion in resolving the designated issues based on the evidentiary materials that were timely filed in her court. The factual findings made by the convicting court were not erroneous; they were just counter to those requested by petitioner. The Texas Court of Criminal Appeals conducted its own review of the record and determined that the convicting court's findings and conclusions were supported by the record. *Ex parte Daniel*, WR-83,459-01, at 6.

Petitioner was not denied due process in the proceedings below. The judge of the convicting court provided him with notice of the controverted issues and the manner in which those issues would be resolved. Petitioner filed substantial evidentiary materials in the convicting court in support of his writ application. But, he did not attempt to file additional evidentiary materials in the manner allowed by the Texas Court of Criminal Appeals. Instead, petitioner moved for a hearing not

mandated by Article 11.071. Furthermore, he did not file additional issues raising due process claims in the convicting court or appealing the denial of his recusal motion as claims for relief in his application for writ of habeas corpus.

Petitioner seeks a new writ hearing in the convicting court with a different judge. His dissatisfaction with the factual findings of the convicting court is not a compelling or appropriate reason for this Court to grant review. Petitioner's due process issues have not been properly presented to or addressed by the Texas Court of Criminal Appeals, and petitioner has not demonstrated that this Court has jurisdiction to hear his claim. Even assuming, arguendo, that this Court did have jurisdiction to hear petitioner's claim, his due process claim is without merit. A writ of certiorari should therefore be denied.

Respectfully submitted,

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No. 17-7492

IN THE
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BRANDON DANIEL,
Petitioner,
v.
THE STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the
Texas Court of Criminal Appeals

CERTIFICATE OF SERVICE

As required by Supreme Court Rule 29, I hereby certify that on this the 20th day of February, 2018, that a true and correct copy of this Brief in Opposition is being served by U.S. Postal Service, first class postage, and electronic mail to the Petitioner's attorneys at the Office of Capital and Forensic Writs, Jennae Swiergula, jenna.swiergula@ocfw.texas.gov, and Ashley Steele, Ashley.steele@ocfw.texas.gov, 1700 N. Congress Avenue, Suite 460, Austin, Texas 78701, (512) 463-8600. I further certify that I am a member of the Bar of this Court.



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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h) and 33.2(b), I certify that the Respondent' Brief in Opposition contains 5,593 words, excluding the parts exempted by Supreme Court Rule 33.1(d), and does not exceed 40 pages. I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 20, 2018.



Michael Scott Taliaferro
Counsel of Record for Respondent